92-192

No. _____

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jay A. Zweig
Counsel of Record
Leah Pallin
Of Counsel
GALLAGHER & KENNEDY, P.A.
2600 N. Central Avenue
Phoenix, Arizona 85004
(602) 530-8407
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether Federal Rule of Civil Procedure 8(e)(2), which permits inconsistent, alternative and hypothetical pleading, should be construed so as to subvert the binding effect of judicial admissions, where a party has pled a contingent liability-over claim, and has made admissions that have destroyed the factual basis for its claim, not only in the pleadings but also in response to Rule 36 Requests for Admissions, in response to a statement of facts in support of a motion for summary judgment and in a pretrial order.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Aetna Life Insurance Company and Provident Life and Accident Insurance Company were parties to the proceedings in the Court of Appeals.

RULE 29.1 COMPLIANCE

Petitioner Provident Life & Accident Insurance Company states that parent holding company Provident Life and Accident Insurance Company of America has issued shares to the public. No other parent or subsidiary companies have issued shares.

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . ii, iii

OPINIONS BELOW 2

JURISDICTION 2

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. *This Court Has the Prime Responsibility For the Proper Functioning of the Federal Judiciary and Should Clarify the Impact of Rule 8(e)(2) as it Relates to Judicial Admissions.* 7

II. *The Ninth Circuit Opinion Appears to Conflict In Principle With A Recent Third Circuit Opinion and Is An Overbroad Construction of the Rule of Law Regarding Hypothetical Pleading* 10

III. *The Ninth Circuit Opinion Conflicts In Principle With Previous Ninth Circuit Opinions* 13

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDICES

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

Cases

999 v. C.I.T. Corp., 776 F.2d 866 (9th Cir. 1985) 13

American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224 (9th Cir. 1988) . 8

Florida v. Rodriguez, 469 U.S. 1 (1984) 7

Giannone v. United States Steel Corp., 238 F.2d 544 (3rd Cir. 1956) . . 9, 10

Hickman v. Taylor, 329 U.S. 495 (1947) 8

Langer v. Monarch Life Ins. Co., 1992 WL 125081 (3rd Cir. June 11, 1992) 11-13

McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2306 (1992) 14

McNabb v. United States, 318 U.S. 332 (1943) 7

Molsbergen v. United States, 757 F.2d 1016 (9th Cir. 1985) *cert. dismissed*, 473 U.S. 934 (1985) 13, 14

Schlagenhauf v. Holder, 379 U.S. 104 (1964) 8

Statutes and Rules

Federal Rules of Civil Procedure:

Rule 8(e)(2) . 2, 7, 8, 10, 11, 12, 15

Rule 11 . . . . . 2, 9

Rule 36 . . . . . 2, 4, 7, 11-13

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 3

No. _____

In The

SUPREME COURT OF THE UNITED STATES

_____

October Term, 1992

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY,

Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Provident Life & Accident Insurance Company requests that a writ of certiorari issue to review the April 30, 1992, judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum Opinion of the Ninth Circuit was not reported and is reprinted in Appendix A.

The Memorandum Opinion and Order of the United States District Court of Arizona was not reported and is reprinted in Appendix B.

JURISDICTION

The Ninth Circuit Memorandum Opinion was filed on April 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES OF CIVÍL PROCEDURE INVOLVED

The Rules involved are Rules 8(e)(2), 11 and 36 of the Federal Rules of Civil Procedure. A copy of each appears in Appendix C.

STATEMENT OF THE CASE

Shawna Blondek ("Blondek") sued respondent Aetna Life Insurance Company ("Aetna") for misrepresentation, breach of contract and bad faith when Aetna advised her that it would pay for only two hours per day for nursing care instead of the 24 hours of care per day that she claimed. Invoking diversity jurisdiction under 28 U.S.C. § 1332, Aetna removed Blondek's Arizona state court action to the United States District Court for Arizona. Aetna answered, disputing the claim that Blondek required 24 hours per day of skilled nursing care as a matter of medical necessity and contending that most of the nursing care sought was custodial. Aetna admitted that two hours per day of skilled nursing care on a regular basis was all that was medically required or covered under the Aetna policy.

Contemporaneously with its answer, Aetna brought a third party complaint against Provident Life & Accident Insurance Company ("Provident"). Aetna alleged that the Aetna and Provident policies provided identical nursing care benefits. It further alleged that Provident was Blondek's primary insurer, and if skilled nursing care for Blondek was covered under the Aetna policy, it was also covered under the Provident policy and Provident should pay the benefits. Aetna prayed that if judgment was entered in Blondek's favor against Aetna, Aetna should have judgment over against Provident.

Discovery lasted 33 months. Aetna admitted in response to Blondek's Rule 36 Requests for Admissions that Blondek required no more than two hours of nursing care per day. Aetna's opposition to Blondek's motion for summary judgment disputed Blondek's need

for 24-hour per day nursing care. In the pretrial order submitted by the parties and entered by the district court, Aetna again disputed Blondek's claim for 24 hours per day of care.

Aetna and Provident filed cross motions for partial summary judgment to determine which company provided primary insurance coverage to Blondek. The district court ruled that Provident provided primary coverage for Blondek's claims.

Days before trial, Aetna settled with Blondek, agreeing to pay her 24-hour care for life as long as she lived in a private residence and paid her a lump sum of $2.5 million. Blondek agreed to repay Aetna any benefits Blondek received from Provident or any other insurers.

Seeking to abandon its judicial admissions and now argue that Blondek required 24-hour nursing care, Aetna

then moved to dismiss its third party complaint against Provident without prejudice. The district court, recognizing the impropriety of allowing Aetna to attempt to set aside nearly three years of judicial admissions, denied Aetna's motion. (Appendix B at 3.)

On the morning of trial, Provident filed a "Motion in Limine to Preclude Aetna From Contradicting Its Pleadings and Judicial Admissions Concerning Shawna Blondek's Custodial Care and Motion for Judgment on the Pleadings." The district court declined to permit Aetna to go to trial to disprove its judicial admissions, granted Provident's motion and dismissed Aetna's third party complaint against Provident with prejudice.

Aetna had admitted its policy was identical to Provident's with respect to nursing care. Aetna had also admitted

pursuant to Rule 36, that under Aetna's policy Blondek was entitled to only two hours per day of nursing care. Nonetheless, the Ninth Circuit reversed the judgment entered by the district court, holding that Aetna's judicial admissions were not binding and remanded the matter for a trial on the medical necessity of skilled nursing care benefits for Blondek.

REASONS FOR GRANTING THE WRIT

I. *This Court Has the Prime Responsibility For the Proper Functioning of the Federal Judiciary and Should Clarify the Impact of Rule 8(e)(2) as it Relates to Judicial Admissions.*

This Court has long acknowledged the importance of its supervisory power over lower federal court proceedings. *McNabb v. United States*, 318 U.S. 332 (1943); *see also Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the court of last

resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation"). Providing guidance to the courts regarding the proper implementation of the Federal Rules of Civil Procedure is an important facet of that supervisory responsibility. *Hickman v. Taylor,* 329 U.S. 495, 497 (1947); *Schlagenhauf v. Holder,* 379 U.S. 104, 106 (1964). This case presents a recurring procedural problem that should be resolved after plenary consideration by this Court.

"Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). The policy of Rule 8(e)(2),

Federal Rules of Civil Procedure, 28 U.S.C. (hereafter "Rule ___"), is to encourage parties "to plead not only what they know is factually true, but also any fact if they believe 'there is good ground to support it.'" *Giannone v. United States Steel Corp.*, 238 F.2d 544, 548 (3rd Cir. 1956) (quoting Rule 11). Literally applied, these two legal principles create an irreconcilable conflict. In response to this dichotomy, courts have recognized an exception to the general rule of admissions so that one of two inconsistent pleas cannot be used as evidence in the trial of the other. *Id.* at 547, n.4. The exception seems straightforward. Nonetheless, when applied to pleadings in a complicated joinder situation, involving the contingent liability of third parties, some courts lose sight of common sense

and sound legal principles. *See Giannone* at 548 (the conflict that arises between the admissions through pleading rule and Rule 8 presents "a difficult question"). Lower courts need this Court's guidance because confusion exists not only between circuits but also between panels of the Ninth Circuit regarding this conflict.

II. *The Ninth Circuit Opinion Appears to Conflict In Principle With A Recent Third Circuit Opinion and Is An Overbroad Construction of the Rule of Law Regarding Hypothetical Pleading.*

The Ninth Circuit opined that when Aetna alleged in its third party complaint that "'[i]f, in fact, skilled nursing care for Shawna Blondek is medically necessary, covered under the Aetna policy, it is also covered under the Provident policy and Provident should be paying the benefits,'" it was utilizing a "form of hypothetical pleading contemplated and authorized by

Rule 8(e)(2)." (Appendix A at 4-5.) Although the Ninth Circuit recognized that Aetna's answer admitted that its policy would cover only two hours per day of care, it held that admission was not binding because "Aetna was in a not all too uncommon position of having to fend off an action by the insured, while attempting to ensure indemnification from a third-party." (*Id.* at 5.)

In failing to recognize that Aetna's position was fundamentally inconsistent with the rules regarding judicial admissions, the Ninth Circuit misconstrued the liberal pleading practices of Rule 8(e)(2). The Third Circuit recognized this inconsistency and held that rigorous application of Rule 36 does not subvert the privilege to plead alternatively or hypothetically. *Langer v. Monarch Life Ins. Co.*, 1992 WL 125081 at 15 (3rd Cir.

June 11, 1992). Indeed:

> A party may certainly allege inconsistent facts in its pleadings, but requests for admission typically come late in discovery, or even after discovery has been completed and trial is imminent. If at that point a party is served with a request for admission of a fact that it now knows to be true, it must admit that fact, even if that admission will gut its case and subject it to summary judgment. That is what Rule 36 was intended to do--narrow the issues for trial, or even altogether obviate the need for trial.

Id. at 16.

Moreover, if the third party plaintiff was asked to admit to "a specific operative fact about a past event . . . it must admit that fact if the fact is known to be true." Id. at 16. "And that admission could be used to support summary judgment against it, even on a hypothetical, liability-over claim." *Id.*

The Ninth Circuit erred by construing Rule 8(e)(2) too strictly and

by failing to apply Rule 36, thus subverting its salutary purpose. *See Id.* at 13 (Rule 36 serves the vital purpose of narrowing issues that are triable); *see also, 999 v. C.I.T. Corp.*, 776 F.2d 866, 869-70 (9th Cir. 1985) (Rule 36 admissions are binding and preclude inconsistent evidence). The Ninth Circuit opinion erroneously conflicts in principle with the Third Circuit's holding in *Langer*. Review of the Ninth Circuit opinion is imperative because the proper implementation of the Federal Rules of Civil Procedure is essential for the orderly and uniform administration of justice.

III. *The Ninth Circuit Opinion Conflicts In Principle With Previous Ninth Circuit Opinions.*

The Ninth Circuit Court of Appeals cited *Molsbergen v. United States,* 757 F.2d 1016, 1019 (9th Cir. 1985) *cert. dismissed,* 473 U.S. 934 (1985), and

McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1990) *cert. denied,* ___ U.S. ___, 112 S.Ct. 2306 (1992), as authority for the proposition that one pleading may not be read as a judicial admission against an alternative or inconsistent pleading in the same case. Appendix A at 4. Neither case dealt with a contingent liability claim in the third party context. The *Molsbergen* Court noted that its ruling applied to inconsistency at the initial pleading stage and observed that:

> Whether, and under what circumstances, inconsistent allegations may be used as admissions, or for other proper evidentiary purposes later in the same action, or in related or subsequent actions, are issues not present . . . for decision.

Molsbergen v. United States, 757 F.2d at 1019, fn.4.

This proviso implied that admissions made later in the proceeding would preclude reliance on Rule 8(e)(2)'s liberal pleading policy. The Ninth Circuit opinion in this case conflicts in principle with its earlier opinions. Plenary review by this Court would provide the Ninth Circuit with a consistent approach to the question.

CONCLUSION

For the reasons stated this Court should grant this petition for certiorari.

RESPECTFULLY SUBMITTED this 28th day of July, 1992.

GALLAGHER & KENNEDY, P.A.

By:_____

Jay A. Zweig
Counsel of Record
Leah Pallin
Of Counsel
2600 North Central Avenue
Phoenix, Arizona 85004
Counsel for Petitioner

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

Jay A. Zweig, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for petitioner in this cause; that on the 28th day of July, 1992, he mailed three copies of petitioner's Petition for a Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Scott E. Boehm, Esq.
COPPLE, CHAMBERLIN & BOEHM, P.C.
2025 N. Third Street, Suite 300
Phoenix, Arizona 85004
Counsel for Respondent

and that he also mailed forty copies of petitioner's Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

_____
Jay A. Zweig

SUBSCRIBED AND SWORN to before me this 28th day of July, 1992.

_____
Notary Public

My commission expires:

_____

89136

Appendix A-1

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AETNA LIFE INSURANCE COMPANY, a foreign corporation,	)	No. 91-15180
	)	D.C. No. CV 88-00157-CLH
Defendant-third-party-plaintiff-Appellant,	)	MEMORANDUM*
v.	)	
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,	)	
Third-party-defendant-Appellee.	)	

Appeal from the United States District Court for the District of Arizona
Charles L. Hardy, District Judge, Presiding

Argued and Submitted April 15, 1992
San Francisco, California

Before: GOODWIN, SCHROEDER, and LEAVY, Circuit Judges.

This appeal arises from Shawna Blondek's action seeking 24-hour medical care under an ERISA group health policy

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

from her insurer, Aetna Life Insurance Company ("Aetna"). After Blondek filed her action, Aetna joined Provident Life Insurance Company ("Provident") as a third-party defendant. Aetna sought indemnification from Provident in the event 24-hour treatment was "medically necessary", claiming Provident was responsible as the primary insurance carrier.

Aetna disputed Blondek's claimed need for 24-hour care in its answer, in its third-party claim against the primary insurer, Provident, and in other pretrial documents. A few days before trial, Aetna entered into a settlement agreement with Blondek and agreed to provide her with 24-hour care. On the day of trial, upon Provident's Fed. R. Civ. P. 12(c) motion, the district court concluded Aetna was bound by its judicial admission that 24-hour care for

Blondek was not "medically necessary", and granted judgment on the pleadings to Provident. Aetna filed this appeal. We have jurisdiction under 28 U.S.C. § 1291 and we reverse.

A judgment on the pleadings is reviewed *de novo*. *See 3550 Stevens Creek Assoc. v. Barclays Bank of California,* 915 F.2d 1355, 1357 (9th Cir. 1990), *cert. denied,* 111 S. Ct. 2014 (1991). "Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law." *Id. See also* Fed. R. Civ. P. 12(c).

Federal Rule of Civil Procedure 8(e)(2) provides in relevant part:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses . . . . A party may also state as many separate claims or defenses as the party has

> regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Normally, we will not permit one pleading to be read as a judicial admission against an alternative or inconsistent pleading in the same case. *Molsbergen v. United States,* 757 F.2d 1016, 1019 (9th Cir.), *cert. denied,* 473 U.S. 934 (1985). "[A] policy which permits one claim to be invoked as an admission against an alternative or inconsistent claim would significantly restrict, if not eliminate, the freedom to plead inconsistent claims provided by Rule 8(e)(2)." *Id.; accord McCalden v. California Library Ass'n,* No. 88-5727, slip op. at 856 (9th Cir. January 24, 1992).

In its third-party complaint, Aetna alleged: "If, in fact, skilled nursing care for Shawna Blondek is medically

necessary, covered under the Aetna policy, it is also covered under the Provident policy and Provident should be paying the benefits." This is a form of hypothetical pleading contemplated and authorized by Rule 8(e)(2). Additionally, Aetna admitted in its answer that two hours per day of care would be covered under the policy. Aetna was in a not all too uncommon position of having to fend off an action by the insured, while attempting to ensure indemnification from a third-party.

Prior to reaching the settlement with Blondek, Aetna agreed to provide coverage for her continuing medical needs pending resolution of the lawsuit. Following a determination by the district court that Provident was the primary insurance carrier, Aetna settled its lawsuit with Blondek. By settling, Aetna assumed the risk of proceeding to

trial to prove the necessity for the 24-hour care. This was a completely legitimate strategy by Aetna. Aetna must now be permitted to proceed to trial and attempt to prove that 24-hour care for Blondek is medically necessary. As the primary insurance carrier, Provident is only required to indemnify Aetna to the extent Aetna is able to prove there is coverage under Provident's policy.

Under Ariz. Rev. Stat. § 12-341.01, Aetna is entitled to an award of reasonable attorneys' fees on appeal. The judgment of the district court, including the award of reasonable attorneys' fees and taxable costs to Provident, is reversed.

REVERSED and REMANDED.

Appendix B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SHAWNA BLONDEK, an Incapacitated Adult, by and through her Guardian ad Litem and Next Friend, Sandra Blondek, Plaintiff, AETNA LIFE INSURANCE COMPANY, a foreign corporation, Defendant.	No. CIV 88-157 PHX CLH MEMORANDUM OPINION AND ORDER

Provident Life and Accident Insurance Company, the third party defendant, has petitioned for an award of attorneys' fees from Aetna Life Insurance Company, the third party plaintiff. Provident contends that it is the successful party under A.R.S. § 12-341.01 and ERISA, 29 U.S.C. § 1132(g)(1).

Shawna Blondek, the plaintiff, is an insured under a group comprehensive medical expense policy issued by Aetna. She suffers from brain damage. She

brought this action through her next friend alleging that she requires skilled nursing care 24 hours a day, that she was entitled to benefits for nursing care 24 hours a day as Aetna's insured, and that Aetna had stated that it would provide her no more than two hours of nursing care per day. After Blondek moved for a preliminary injunction to require Aetna to continue to pay for 24 hours of nursing care per day, Aetna agreed to provide that care pending resolution of the issue. Aetna joined Provident as a third party defendant, alleging that Blondek was also an insured under a group health insurance policy issued by Provident and that Provident's policy provided primary coverage. Aetna and Provident both contended that Blondek did not require nursing care 24 hours a day.

On September 9, 1980, in ruling on cross motions for partial summary

judgment, the Court ruled that Provident's policy provided primary coverage for Blondek's claims. At that point, Aetna was the successful party.

About October 1, 1990, Aetna entered into a settlement agreement with Blondek which, among other things, obligated Aetna to provide her with nursing care 24 hours a day for the rest of her life. Aetna then moved to dismiss its third party complaint against Provident without prejudice. As aptly stated by Provident in opposing the motion, Aetna's purpose was to give itself "time to regroup, rediscover, and refile" a claim against Provident for payment of Blondek's nursing care. The motion was denied.

On October 9, 1990, the day the case was scheduled to go to trial, Provident filed a motion (1) in limine to preclude Aetna from contradicting its pleadings and judicial admissions that

Blondek did not require 24-hour nursing care and (2) for judgment on the pleadings. The motion was granted, and in a sense, the mantle of successful party shifted form Aetna to Provident.

Implicit in every fee shifting statute is the adversarial nature of litigation. The loser pays the successful adversaries attorneys' fees. In this case, Aetna and Provident were not in an adversarial relationship until Aetna settled with Blondek. Before then, both contended that Blondek did not require nursing care 24 hours a day. A truly adversarial relationship between Aetna and Provident was not created until Aetna settled with Blondek and then (implicitly) adopted her position that she was entitled to nursing care 24 hours a day, which should be paid by the primary insurer. Accordingly, the Court feels that attorneys' fees should be assessed against Aetna only for legal

services that were performed after the settlement.

Before discussing the basis for fixing attorneys' fees, some comment should be made regarding the nature of the services of Provident's attorneys. In most firms of more than ten lawyers today, law is practiced by committees. Everything that is done and every decision that is made seems to require a conference between different levels of the law firm's hierarchy--senior partner, junior partner, associate, legal assistant and paralegal. Writings are drafted, edited, revised, redrafted and then passed up and down the hierarchy for additional review, revision and editing. Of course, all these conferences, reviews, revisions and redraftings build up billable hours. The time records of Provident's attorneys suggests that they practice law differently. One lawyer performed

about 88% of the work for which Provident was billed. Work by senior partners was minimal, slightly more than one percent, and most of that work was when the case first came into the office and before it was assigned to the lawyer who did most of the work.

In "litigation between fee-paying clients, there is no need to determine the reasonable hourly rate prevailing in the community for similar work because the rate charged by the lawyer to the client is the best indication of what is reasonable under the circumstances of the particular case." *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 187, 673 P.2d 927 (App. 1983). The amount of hours claimed must also be reasonable. *See Schweiger,* 138 Ariz. at 188.

In responding to Provident's application, Aetna did not contest the reasonableness of the hours claimed by

Provident's attorneys. In fixing a reasonable attorneys' fee, the Court has applied the guidelines announced in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

IT IS ORDERED granting the third party defendant Provident Life and Accident Insurance Company's application for award of attorneys' fees and awarding attorneys' fees in the sum of $11,805.

IT IS FURTHER ORDERED overruling the third party plaintiff Aetna Life Insurance Company's Objection to Form of Judgment.

The judgment tendered by Provident is signed and filed.

DATED this 14th day of December, 1990.

CHARLES L. HARDY
Judge of the United States
District Court

cc: all counsel of record

Appendix C-1

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(e)(2)

(e) Pleading to be Concise and Direct; Consistency.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Appendix C-2

Rule 11

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information,

and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of

the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 36

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Appendix C-5

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance

of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter or which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or

amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Supreme Court, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

No. 92-192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SCOTT E. BOEHM
COUNSEL OF RECORD
COPPLE, CHAMBERLIN & BOEHM, P.C.
2025 North Third Street, #300
Phoenix, Arizona 85004
(602) 528-4719
Attorneys for Respondent

28 pp

QUESTION PRESENTED FOR REVIEW

The petitioner's statement of the issue is misleading because it contains fact-specific phrases which are not supported by the record. The true issue is whether the Ninth Circuit was correct in following the universally-accepted rule in multi-party cases that a party is not bound as to a second party by its alternate and inconsistent positions against a third party.

LIST OF ALL PARTIES TO THE NINTH CIRCUIT APPEAL

Aetna Life Insurance Company was the only appellant in the Ninth Circuit. Provident Life and Accident Insurance Company was the only appellee.

RULE 29.1 CORPORATE DISCLOSURE

Respondent Aetna Life Insurance Company is a Connecticut corporation and a wholly-owned subsidiary of Aetna Life & Casualty, another Connecticut corporation. Aetna Life Insurance Company has no other parent companies, subsidiaries or affiliates which have issued shares to the public.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

DECISIONS BELOW 2

JURISDICTION 2

FEDERAL PROCEDURAL RULE AND ARIZONA STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 8

I. The Ninth Circuit Correctly Followed the Universally-Recognized Exception to the Judicial-Admissions Rule Applicable to Multi-Party Cases Involving Alternate or Inconsistent Claims and Joinder 8

II. The Ninth Circuit's Decision is Consistent With its Earlier Opinions on the Same Issue 11

III. The Ninth Circuit's Decision Does Not Conflict With a Recent Opinion of the Third Circuit 11

REQUEST FOR ATTORNEY'S FEES 13

CONCLUSION 13

CERTIFICATE OF SERVICE 15

APPENDICES

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

TABLE OF AUTHORITIES

CASES	Page(s)
Continental Insurance Co. of New York v. Sherman, 439 F.2d 1294 (5th Cir. 1971)	8, 9, 10
Dartez v. Owens-Illinois, Inc. 910 F.2d 1291 (5th Cir. 1990)	10
Douglas Equipment, Inc. v. Mack Trucks, Inc., 471 F.2d 222 (7th Cir. 1972)	10
Ferguson v. Neighborhood Housing Services 780 F.2d 549 (6th Cir. 1986)	8
Gadaleta v. Nederlandsch-Amerekaansche Stoomvart, 291 F.2d 212 (2nd Cir. 1961)	10
Garman v. Griffin, 666 F.2d 1156 (8th Cir. 1981)	10
Hardy v. Johns-Manville Sales Corp., 851 F.2d 742 (5th Cir. 1988)	10
Langer v. Monarch Life Insurance Co., 966 F.2d 786 (3rd Cir. 1992)	11, 12
McCalden v. California Library Association, 955 F.2d 1214 (9th Cir. 1990)	10, 11
McNeese v. Reading & Bates Drilling Co., 749 F.2d 270 (5th Cir. 1985)	10
Molsbergen v. United States, 757 F.2d 1016 (9th Cir. 1985)	10, 11
Myers v. Manchester Insurance & Indemnity Co., 572 F.2d 134 (5th Cir. 1978)	8
Nichols v. Barwick, 792 F.2d 1520 (11th Cir. 1986)	10
Oki America, Inc. v. Microtech International, Inc., 872 F.2d 312 (9th Cir. 1989)	10
Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981)	10

CASES *Page(s)*

Whatley v. Armstrong World Industries, Inc., 861 F.2d 837 (5th Cir. 1988) 10

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

A.R.S. § 12-341.01 ..... 2, 13

F.R.C.P. Rule 8(e) (2) 2, 7, 8, 9, 10

No. 92-192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Aetna Life Insurance Company opposes the petitioner's request for a Writ of Certiorari to review the April 30, 1992, memorandum decision of the Ninth Circuit. The Court's decision is correct, well-reasoned and pursuant to universally-recognized authority. The petition has no merit and should be denied.

DECISIONS BELOW

The memorandum decision of the Ninth Circuit was not reported and is reprinted in Appendix A.

The judgment of the United States District Court of Arizona was also not reported and is reprinted in Appendix B.

JURISDICTION

The Court has jurisdiction to consider the petition under 28 U.S.C. § 1254(1).

FEDERAL PROCEDURAL RULE AND ARIZONA STATUTE INVOLVED

This case involves F.R.C.P. Rule 8(e)(2) and Arizona Revised Statute (A.R.S.) § 12-341.01. The rule and statute are reprinted in Appendices C and D, respectively.

STATEMENT OF THE CASE

This is a bad-faith insurance case for the recovery of nursing-care benefits. The plaintiff below was Shawna Blondek, a brain-injured beneficiary of an insurance policy which Aetna issued to her father. Blondek was also a beneficiary of another policy which Provident issued to her mother. The Provident policy replaced the mother's prior policy with Lincoln National Insurance Company effective January 1, 1988. All three policies required that care be "medically necessary" for coverage.

Prior to January 1, 1988, Lincoln National paid Blondek for 24-hour per day care subject to an annual deductible. Aetna paid the balance of the expenses pursuant to Blondek's father's policy. When Provident reviewed Blondek's claim prior to taking over as her mother's insurer on January 1, 1988, it determined that nursing care was not "medically necessary" 24-hours per day. Provident would only pay for eight hours of care per week, so Blondek contacted Aetna to pay the rest of her expenses. Aetna then made an internal decision that 24-hour per day care was not "medically necessary," and it agreed to pay for two hours of care per day.

Blondek immediately filed a bad-faith complaint against Aetna and requested a preliminary injunction requiring Aetna to pay for 24-hour per day care. The injunction aspect was resolved by agreement. To protect Blondek if a jury eventually agreed that 24-hour per day care was "medically necessary," Aetna volunteered to pay all expenses pending the outcome of the lawsuit. Aetna's answer stated as follows:

XV.

> In answering [Blondek's request for a preliminary injunction], defendant alleges that the allegations are moot since Aetna has agreed to provide for the cost of twenty-four hour skilled nursing care *pending a determination as to whether that degree of*

> *care is required, and pending a determination as to whether that degree of care is covered under another policy of insurance providing primary insurance to Shawna.*

Aetna's answer also "dispute[d]" Blondek's allegation that she required 24-hour per day care.

Aetna also filed a third-party complaint against Provident on the alternative theory that if Blondek did require 24-hour care, then Provident was liable because it was Blondek's primary insurer and Aetna only afforded excess coverage:

> **VIII.**
>
> If, in fact, skilled nursing care for Shawna Blondek is medically necessary [and] covered under the Aetna policy, it is also covered under the Provident policy and Provident should be paying the benefits.
>
> **IX.**
>
> Provident has refused to pay more than a limited amount of skilled nursing care on a weekly basis. Pending a resolution of the question as to Shawna's entitlement for insurance benefits with respect to skilled nursing care, any benefits owed by Aetna under any insurance policy, are owed by Provident and not by Aetna.

The third-party complaint prayed for a declaration of "the rights and obligations of Shawna Blondek, Aetna and Provident with respect to Shawna's claim to 24-hour nursing care."

Aetna pursued both alternate theories throughout discovery and pre-trial motions. Aetna's Statement of Facts in support of its response to Blondek's Motion for Summary

Judgment repeated that it "disputes" Blondek's need for 24-hour care. Aetna also admitted in response to one of Blondek's Requests for Admission that it had made an internal decision that Blondek's care could be reduced.

At the same time, Aetna and Provident were actively litigating Aetna's alternate theory that Provident afforded primary coverage for Blondek's care. Both Aetna and Provident eventually filed a Motion for Summary Judgment on that issue.

The Rule 42(C) Pretrial Order also reflected Aetna's alternate theories of the case. The threshold issue of whether 24-hour care is necessary was stated in the Statement of Contested Issues of Fact. Aetna's defensive position against Blondek was threefold:

> 1. While some daily skilled nursing care is medically necessary, 24-hour round-the-clock, skilled nursing care is not medically necessary;
>
> 2. The care Blondek currently receives and has received in the past is primarily custodial in nature, not requiring 24-hour skilled nursing care; and
>
> 3. At most, daily skilled nursing care ought to be necessary for one to two hours at meal time, which would total three to six hours a day.

Aetna's alternative third-party theory against Provident was also set forth in Aetna's Statement of Contested Facts:

> 9. At the same time that Aetna agreed to reinstate payment of skilled nursing care on a 24-hour basis pending the outcome of the lawsuit, . . . *Aetna filed a third-party complaint bringing Provident into the lawsuit, seeking to obtain reimbursement of the 24-hour skilled*

> *nursing care expenses paid by Aetna, if it was determined in the litigation that Shawna was entitled to skilled nursing care on a 24-hour basis.*

Aetna's alternate theory against Provident was also detailed in its Statement of Contested Issues of Law:

> 3. Whether the Aetna conversion policy provides primary or secondary coverage for covered medical expenses that are also covered under the Provident group policy.
>
> * * *
>
> 6. Whether Aetna provides "primary" or "secondary" coverage for benefits that are also covered by any group health insurance policy issued to the employer of Shawna's mother.
>
> * * *
>
> 9. Whether only a portion of Shawna's 24-hour a day care needs to be rendered by a skilled nurse.
>
> * * *
>
> 11. Whether Aetna is entitled to reimbursement from Provident for any monies paid by Aetna for skilled nursing care or whether other medical expenses incurred by Shawna where Provident has denied coverage for all or portions of those services and expenses.

Subsequent to the Rule 42(C) Pretrial Order, the District Court decided as a matter of law that Provident was Blondek's primary insurer, and that Aetna's coverage was only secondary and excess. Accordingly, if 24-hour care is medically necessary for Blondek, then Provident should have paying for it from January 1, 1988, forward.

On the day before trial was to begin, Blondek and Aetna settled. Aetna conceded that 24-hour per day care was medically necessary, and it also agreed to afford Blondek an unlimited lifetime benefit for payment of that care.

At that point, only the third-party complaint remained. If the jury were to determine that 24-hour per day care is required for Blondek, then Provident would have to pay for those services because the District Court already ruled that Provident is Blondek's primary insurer as a matter of law. In short, Aetna might get back from Provident the nursing expenses it agreed in the settlement to pay for Blondek.

On the morning trial was to have started, Provident filed a "Motion in Limine to preclude Aetna from contradicting its pleadings and judicial admissions concerning Blondek's custodial care and Motion for Judgment on the Pleadings." The theory of those motions was that Aetna was irrevocably bound by its defensive position against Blondek that 24-hour per day care was not medically necessary.

The District Court decided the motion without allowing Aetna to respond and without conducting any independent research. After five minutes of argument, the District Court granted Provident's Motion for Judgment on the Pleadings:

> I think that I am going to have to rule that you are bound by your pleadings and grant the Motion for Judgment on the Pleadings in favor of Provident. That will be the order of the Court.

The Ninth Circuit reversed based upon the universally-recognized rule that a party is not bound as to a second party by alternate and inconsistent allegations against a third-party. The Court emphasized that alternate and inconsistent pleading is expressly encouraged by F.R.C.P. Rule 8(e)(2), and that a policy which permitted one claim to be invoked as an admission against an alternative or

inconsistent claim would significantly restrict, if not eliminate, the freedom to plead inconsistent claims.

REASONS FOR DENYING THE WRIT

I. Ninth Circuit Correctly Followed The Universally-Recognized Exception To The Judicial-Admissions Rule Applicable To Multi-Party Cases Involving Alternate Or Inconsistent Claims And Joinder.

Provident's District Court motion was based on the usual rule in two-party lawsuits that stipulations or statements in a complaint, answer or pre-trial order are judicial admissions which are binding on the parties and the Court. See, *Ferguson v. Neighborhood Housing Services,* 780 F.2d 549 (6th Cir. 1986); *Myers v. Manchester Insurance & Indemnity Co.,* 572 F.2d 134 (5th Cir. 1978).

If the District Court had not been so hasty in ruling on Provident's motion withouf a response or independent research, it would have realized that the traditional two-party rule has been abandoned in multi-party cases which involve alternate or inconsistent claims and joinder. The universally-recognized exception evolved from the modern rules of pleading and third-party practice. Its genesis is the F.R.C.P. Rule 8(e)(2) edict that a party may set forth two or more claims or defenses regardless of whether they are alternate, hypothetical or inconsistent.

The conflict between the traditional rule of judicial admissions and the encouragement of inconsistent and alternative pleadings was first addressed in *Continental Insurance Co. of New York v. Sherman,* 439 F.2d 1294 (5th Cir. 1971). There, the owner of a schooner agreed to loan it to a friend for use in ornithological research. Both men contacted an insurance agent who obtained coverage for the vessel from Continental. The schooner was subsequently destroyed in a collision, and Continental filed suit against the owner to deny coverage on the ground that it had no

knowledge that the vessel would be used for commercial purposes.

The owner filed a third-party complaint against the agent on the theory that the agent knew of the intended commercial use. The agent denied such knowledge in its answer, but also filed a cross-claim against Continental on the alternative theory that it had informed the insurer about the commercial use.

The agent's theories were blatantly inconsistent, and the owner attempted to bind the agent to its cross-claim admission that it knew of the commercial purpose and passed that information along to Continental. The *Sherman* Court stated the traditional rule of judicial admissions, but recognized that that rule was in direct conflict with the liberal pleading rules of modern practice. *Sherman* then proceeded to adopt "a necessary exception to the general rule" as follows:

> Strictly applied, however, the [traditional rule] would place a litigant at his peril in exercising the liberal pleading and joinder provisions of the Federal Rules of Procedure in that inconsistent pleadings under Rule 8(e)(2) could be used, in proper circumstances, as admissions in negating each other and the allegations in third-party complaints and cross-claims seeking recovery over in the event of liability in the principle action could be used in that action as admissions establishing liability. Thus, as a necessary exception to the general rule, there is ample authority that one of two inconsistent pleas cannot be used as evidence in the trial of the other.

The *Sherman* court then clarified that the exception also included "inconsistent positions taken in pleadings in a complicated joinder situation, involving, as here, the contingent liability of third parties." 439 F.2d at 1298.

As was pointed out to the Ninth Circuit, the exception has been adopted by every federal court which has

addressed the issue: *McCalden v. California Library Association,* 955 F.2d 1214 (9th Cir. 1990); *Dartez v. Owens-Illinois, Inc.,* 910 F.2d 1291 (5th Cir. 1990); *Oki America, Inc. v. Microtech International, Inc.,* 872 F.2d 312 (9th Cir. 1989); *Whatley v. Armstrong World Industries, Inc.,* 861 F.2d 837 (5th Cir. 1988); *Hardy v. Johns-Manville Sales Corp.,* 851 F.2d 742 (5th Cir. 1988); *Nichols v. Barwick,* 792 F.2d 1520 (11th Cir. 1986); *Molsbergen v. United States,* 757 F.2d 1016 (9th Cir. 1985); *McNeese v. Reading and Bates Drilling Co.,* 749 F.2d 270 (5th Cir. 1985); *Garman v. Griffin,* 666 F.2d 1156 (8th Cir. 1981); *Schneider v. Lockheed Aircraft Corp.,* 658 F.2d 835 (D.C. Cir. 1981); *Douglas Equipment, Inc. v. Mack Trucks, Inc.,* 471 F.2d 222 (7th Cir. 1972).

Not surprisingly, the exception has also been interpreted to include discovery responses. In *Douglas Equipment, Inc. v. Mack Trucks, Inc.,* 471 F.2d 222 (7th Cir. 1972) the Court pointed out that discovery responses in cases involving alternate or inconsistent claims must be considered in light of the underlying pleadings. Parties' answers to discovery in such cases are "obviously conditioned on the hypothetical establishment" of the various alternate theories. The *Douglas Equipment* court approved and affirmed the District Court's refusal to admit into evidence inconsistent discovery responses which pertained to alternative theories of the case. It cited *Sherman* and logically stated that the judicial admissions exception is equally applicable to discovery responses. This reasoning has been followed in numerous other cases. See, *Whatley v. Armstrong World Industries, Inc.,* 861 F.2d 837 (5th Cir. 1988); *McNeese v. Reading & Bates Drilling Co.,* 749 F.2d 270 (5th Cir. 1985); *Gadaleta v. Nederlandsch-Amerekaansche Stoomvart,* 291 F.2d 212 (2nd Cir. 1961).

Here, there is no dispute that Aetna's defense to Blondek's complaint and its cross-claim against Provident are separate, alternative and potentially inconsistent positions. There is also no question that such pleading is encouraged by F.R.C.P. Rule 8(e)(2).

The Ninth Circuit was correct that this case falls squarely within the exception to the traditional judicial-admissions rule. Aetna's contingent third-party complaint assumed the truth of Blondek's allegations that 24-hour care was medically necessary for Shawna. To bind Aetna to its inconsistent positions against Blondek would defeat all of the salutary effects of the flexible joinder provisions of the federal rules. Litigants would follow the rules at their peril, and would have to refrain from making alternate or inconsistent allegations at the risk of their being used as damning evidence against them. The Ninth Circuit understood this, and its decision was entirely consistent with the universally-recognized rule in multi-party cases of alternate or inconsistent claims and joinder.

II. The Ninth Circuit's Decision Is Consistent With Its Earlier Opinions On The Same Issue.

Provident's petition states that the memorandum decision "conflicts in principle" with previous Ninth Circuit opinions. That is absolutely false. As the Court of Appeals pointed out, its memorandum decision is directly in line with its recent opinions in *McCalden v. California Library Association,* 955 F.2d 1214 (9th Cir. 1990) cert. denied, _____ U.S. _____, 112 S.Ct. 2306 (1992), and *Molsbergen v. United States,* 757 F.2d 1016 (9th Cir. 1985). These Ninth Circuit cases are also consistent with those of every other federal circuit which has addressed the issue.

III. The Ninth Circuit's Decision Does Not Conflict With A Recent Opinion Of The Third Circuit.

Provident's final argument was that the memorandum decision conflicts with the Third Circuit's recent opinion in *Langer v. Monarch Life Insurance Co.,* 966 F.2d 786 (3rd Cir. 1992). There is no conflict.

Langer involved consolidated District Court actions in which one party, Monarch, asserted inconsistent positions in defense of one claim and in prosecution of a contingent indemnity claim. However, in response to Requests for Admissions *from the indemnity defendant,* Monarch admitted certain facts to which that defendant wanted Monarch bound. The Third Circuit held that Monarch was bound because the admissions were made *to the indemnity defendant.*

Here, the single Request for Admission mentioned by Provident was originated by Blondek, not Provident. While Aetna would clearly be bound to Blondek by that admission, it had nothing to do with Aetna's alternate and inconsistent third-party claim against Provident. Aetna's third-party complaint was always based on the alternate theory that if Blondek did require 24-hour per day care, then Provident was liable for that care because Provident was Blondek's primary insurer and Aetna only afforded excess coverage. That position was stated in Aetna's answer, its third-party complaint, its Motion for Summary Judgment against Provident, and in the Rule 42(C) Pretrial Order. Aetna *never* conceded to Provident that Blondek did not need 24-hour care.

Moreover, Blondek's Request for Admission only asked Aetna to admit that it had made an administrative decision to reduce Blondek's 24-hour per day benefit. That fact is true, and Aetna is aware that it cannot change the underlying facts of the case. Aetna knows it will have to convince the jury that it later changed its mind and that 24-hour per day nursing care is actually justified by Blondek's medical condition.

All of this was explained in writing and orally to the Ninth Circuit. The Court fully understood the circumstances of the case and correctly applied the universally-accepted principles. *Langer* was a completely different situation, and the Ninth Circuit's memorandum decision in no way conflicts with that Third Circuit Opinion.

REQUEST FOR ATTORNEY'S FEES

A.R.S. § 12-341.01 provides for an award of reasonable attorney's fees to the successful party in a contested action arising out of a contract. The Ninth Circuit awarded attorney's fees to Provident under that section because it was the successful party to the appeal. This Court should award additional fees expended by Aetna in responding to Provident's petition.

CONCLUSION

For all the foregoing reasons, the Court should deny the petition. It should also award Aetna reasonable attorney's fees as the successful party pursuant to A.R.S. § 12-341.01.

RESPECTFULLY SUBMITTED this 27th day of August, 1992.

COPPLE, CHAMBERLIN & BOEHM, P.C.

By: /s/ Scott E. Boehm

SCOTT E. BOEHM
COUNSEL OF RECORD
2025 North Third Street, #300
Phoenix, Arizona 85004
(602) 528-4719
Attorneys for Respondent

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

Scott E. Boehm, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for respondent in this cause; that on the 27th day of August, 1992, he mailed three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Jay A. Zweig, Esq.
GALLAGHER & KENNEDY, P.A.
2600 N. Central Avenue
Phoenix, Arizona 85004
Counsel for Petitioner

and that he also mailed forty copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

/s/ Scott E. Boehm
Scott E. Boehm

SUBSCRIBED AND SWORN to before me this 27th day of August, 1992.

/s/ Cindy R. Lockwood
Notary Public

My Commission Expires:

February 15, 1995

Appendix A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15180
D.C. No. CV 88-00157-CLH
MEMORANDUM*

AETNA LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant-third-party plaintiff-Appellant,

v.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Third-party-defendant-Appellee.

Appeal from the United States District
Court for the District of Arizona
Charles L. Hardy, District Judge, Presiding

Argued and Submitted April 15, 1992
San Francisco, California

Before: GOODWIN, SCHROEDER, and LEAVY, Circuit Judges.

This appeal arises from Shawna Blondek's action seeking 24-hour medical care under an ERISA group health policy from her insurer, Aetna Life Insurance Company ("Aetna"). After Blondek filed her action, Aetna joined Provident Life Insurance Company ("Provident") as a third-

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

party defendant. Aetna sought indemnification from Provident in the event 24-hour treatment was "medically necessary", claiming Provident was responsible as the primary insurance carrier.

Aetna disputed Blondek's claimed need for 24-hour care in its answer, in its third-party claim against the primary insurer, Provident, and in other pretrial documents. A few days before trial, Aetna entered into a settlement agreement with Blondek and agreed to provide her with 24-hour care. On the day of trial, upon Provident's Fed. R. Civ. P. 12(c) motion, the district court concluded Aetna was bound by its judicial admission that 24-hour care for Blondek was not "medically necessary", and granted judgment on the pleadings to Provident. Aetna filed this appeal. We have jurisdiction under 28 U.S.C. § 1291 and we reverse.

A judgment on the pleadings is reviewed *de novo*. *See 3550 Stevens Creek Assoc. v. Barclays Bank of California*, 915 F.2d 1355, 1357 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2014 (1991). "Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law." *Id. See also* Fed. R. Civ. P. 12(c).

Federal Rule of Civil Procedure 8(e)(2) provides in relevant part:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses .... A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Normally, we will not permit one pleading to be read as a judicial admission against an alternative or inconsistent pleading in the same case. *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th Cir.), *cert. denied*, 473 U.S. 934 (1985).

"[A] policy which permits one claim to be invoked as an admission against an alternative or inconsistent claim would significantly restrict, if not eliminate, the freedom to plead inconsistent claims provided by Rule 8(e)(2)." *Id.; accord McCalden v. California Liberty Ass'n,* No. 88-5727, slip op. at 856 (9th Cir. January 24, 1992).

In its third-party complaint, Aetna alleged: "If, in fact, skilled nursing care for Shawna Blondek is medically necessary, covered under the Aetna policy, it is also covered under the Provident policy and Provident should be paying the benefits." This is a form of hypothetical pleading contemplated and authorized by Rule 8(e)(2). Additionally, Aetna admitted in its answer that two hours per day of care would be covered under the policy. Aetna was in a not all too uncommon position of having to fend off an action by the insured, while attempting to ensure indemnification from a third-party.

Prior to reaching the settlement with Blondek, Aetna agreed to provide coverage for her continuing medical needs pending resolution of the lawsuit. Following a determination by the district court that Provident was the primary insurance carrier, Aetna settled its lawsuit with Blondek. By settling, Aetna assumed the risk of proceeding to trial to prove the necessity for the 24-hour care. This was a completely legitimate strategy by Aetna. Aetna must now be permitted to proceed to trial and attempt to prove that 24-hour care for Blondek is medically necessary. As the primary insurance carrier, Provident is only required to indemnify Aetna to the extent Aetna is able to prove there is coverage under Provident's policy.

Under Ariz. Rev. Stat. § 12-341.01, Aetna is entitled to an award of reasonable attorneys' fees on appeal. The judgment of the district court, including the award of reasonable attorneys' fees and taxable costs to Provident, is reversed.

REVERSED and REMANDED.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 88-157-PHX-RGS
JUDGMENT

(Assigned to the Hon. Charles L. Hardy)

SHAWNA BLONDEK, an Incapacitated Adult, by and through her Guardian ad Litem and Next Friend, Sandra Blondek,

Plaintiff,

v.

AETNA LIFE INSURANCE COMPANY,– a foreign corporation,

Defendant,

AETNA LIFE INSURANCE COMPANY, a foreign corporation,

Third Party Plaintiff,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Third Party Defendant.

This action came for hearing before the Court, the Honorable Charles L. Hardy, United States District Judge, presiding, and the issues having been duly heard with regard to third party defendant Provident Life & Accident Insurance Company's Motion in Limine and Motion for Judgment on the Pleadings, and the Court have heard and considered the arguments of counsel, and finding that Provident Life & Accident Insurance Company is entitled to Judgment on the Pleadings against Aetna Life Insurance Company as a matter of law;

NOW, THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that Provident Life & Accident Insurance Company's Motion for Judgment on the Pleadings is hereby granted and Aetna Life Insurance Company's Third-Party Complaint and cause of action is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Provident Life & Accident Insurance Company shall have and recover the sum of $11,805.00, for its reasonable attorneys' fees, pursuant to A.R.S. § 12-341.01 and 29 U.S.C. § 1132(g); and in addition thereto its taxable costs.

DONE IN OPEN COURT this 14th day of December, 1990.

/s/ Charles L. Hardy
Charles L. Hardy, United States
District Court Judge

ORIGINAL AND ONE COPY of the
foregoing lodged this 19th day
of October, 1990, with:

The Honorable Charles L. Hardy
United States District Court Judge
230 North First Avenue
Phoenix, Arizona 85003

Appendix C-1

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(e)(2)

(e) Pleading to be Concise and Direct; Consistency.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Appendix D-1

ARIZONA REVISED STATUTE

§ 12-341.01. Recovery of attorney's fees

A. In any contested action arising out of a contract, express of implied, the court may award the successful party reasonable attorney's fees. This section shall in no manner be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney's fees.

B. The award of reasonable attorney's fees awarded pursuant to subsection A should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted, but such award may not exceed the amount paid or agreed to be paid.

C. Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith. In making such award, the court may consider such evidence as it deems appropriate and shall receive this evidence during trial on the merits of the cause, or separately, regarding the amount of such fees as it deems in the best interest of the litigating parties.

D. Reasonable attorney's fees awarded under the provisions of this section shall be awarded by the court and not by a jury.